Supreme Court, U.S.
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No. 94-942047 JUN 15 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROSEBUD SIOUX TRIBE, THE UNITED STATES FOR THE USE AND BENEFIT OF THE ROSEBUD SIOUX TRIBE,
Petitioner,

v.

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, INC., FREDERICK L. VALANDRA, and RONALD MCDONALD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an arbitration provision in an agreement involving an Indian tribe and another party constitute a waiver of the tribe's sovereign immunity.

PARTIES

The parties to the proceedings below in the Eighth Circuit Court of Appeals were the Rosebud Sioux Tribe, petitioner, and Val-U Construction and its principals, Frederick L. Valandra and Ronald McDonald.

The other parties set forth in the caption of the action in the Eighth Circuit were not parties and did not participate in the appeal below.

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IN THE

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No. 94 - ——

ROSEBUD SIOUX TRIBE, THE UNITED STATES FOR THE USE AND BENEFIT OF THE ROSEBUD SIOUX TRIBE,
Petitioner,

v.

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, INC., FREDERICK L. VALANDRA, and RONALD McDONALD,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully prays that Writ of Certiorari issue to review the Opinion And Order of the United States Court of Appeals for the Eighth Circuit entered in this case on March 16, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at 50 F.3d 560, and is reprinted in the Appendix to this Petition beginning at page 1a. The Order of Dismissal entered by the U.S. District Court of South Dakota, Central Division, was not reported. It is reprinted in the Appendix to this Petition beginning at page 10a.

JURISDICTION

This action was initiated by the petitioner, Rosebud Sioux Tribe, by complaint in the United States District Court of South Dakota, Central Division on April 9, 1991, which invoked the jurisdiction of the federal court under a number of federal statutes, including 28 U.S.C. 1331 and 1362. The action was dismissed by the District Court on March 29, 1994. Notice of Appeal was filed by respondents on April 25, 1994.

The Opinion and Order of the Court of Appeals, of which petitioner now seeks review, was issued on March 16, 1995. The Petition for Rehearing was denied on April 21, 1995. The Mandate was stayed until June 15, 1995, to permit a petition for Writ of Certiorari to be filed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Writ of Certiorari is requested under Supreme Court Rule 10.1(a) & (c).

STATUTE INVOLVED

The determination of the question presented did not require the construction or interpretation of any statute by the Eighth Circuit Court of Appeals.

STATEMENT OF THE CASE

Between late 1987 and early 1988, petitioner, Rosebud Sioux Tribe, entered into a series of contracts under Pub. L. 93-638, 25 U.S.C. 450(f), with the Indian Health Service of the United States Department of Health and Human Services to construct 76 staff quarter units to serve the newly completed Indian Health Service Hospital on the Rosebud Indian Reservation in South Dakota.

The underlying 638 contract between the Department of Health and Human Services and the Rosebud Sioux Tribe was nearly 164 pages in length containing specifications covering virtually every conveivable aspect of the

project, including the content and approval of all construction documents. An excerpt of one part of the underlying 638 contract between Health and Human Services and the Tribe is set forth at Appendix E at page 15a. This excerpt deals with special conditions. It required the Tribe to include as part of the construction bid packages special conditions as set forth in Appendix E. An addendum to the special conditions at Appendix E was required by Health and Human Services. This addendum is set out at Appendix F at page 34a and states that "(a)ll questions of dispute under this Agreement shall be decided by aribtration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."

In the spring of 1989, the Tribe issued a Request for Proposal calling for bids on four parts of the proposal: streets, curb and gutter, water and sewer, and housing. A fifty percent (50%) performance bond and one hundred percent (100%) payment bond with corporate surety was required of the entity to whom the bid was awarded.

Respondent, Val-U Construction, bid on all four parts of the proposal, but was only awarded the low bid on that part dealing with housing. Its bid on the first three parts was high; however, its bid on the housing in the amount of $3,633,165 was almost $1,000,000 lower than the next low bidder. The United States Public Health Service, Office of Engineering Services, recommended that the bid be awarded to Val-U based on the fact that federal procurement policy required that the bid be awarded to the lowest qualified bidder. On July 31, 1989, petitioner, Rosebud Sioux Tribe, and respondent, Val-U, entered into a contract for the above amount. Appendix D at 12a.

Respondent, Val-U Construction, commenced work in the last part of August, 1989. Laborers were paid by a voucher system. Val-U subcontracted the majority of the

work. By January, 1990, Val-U had not completed the first twenty (20) units as required and problems began to surface on the construction site. Val-U was not paying its workmen and subcontractors, the work was not being performed according to specifications, and the work was not on schedule. Mike Atwell, an employee of the United States Indian Health Service, took over as project manager on May 29, 1990. Atwell documented a number of serious problems with the project. Respondents deny that their work was deficient.

The Rosebud Sioux Tribal Council passed Resolution No. 90-124 on September 25, 1990, declaring Val-U to be in default under the construction contract for: (1) failure to maintain a sufficient job crew to complete units on schedule, (2) failure to pay contractors and material suppliers for periods as long as five months despite receiving continuing payments under the construction contract, (3) refusal to pay subcontractors and material suppliers despite admissions to the Rosebud Sioux Tribal Council that there were sufficient funds to do so, and (4) paying subcontractors and material suppliers with checks drawn on accounts with insufficient funds. Further work by Val-U Construction was discontinued and the project was completed by another company.

On October 16, 1990, respondent, Val-U Construction, demanded that the Tribe arbitrate the contract termination. Petitioner Tribe declined, based upon its sovereign immunity.

On April 9, 1991, petitioner Tribe instituted an action in the United States District Court of South Dakota against respondents Val-U Construction, Frederick L. Valandra, and Ronald McDonald, as well as the persons who provided the performance and payment bonds submitted to the Tribe by Val-U Construction to secure its responsibilities under the bid that it was awarded. Petitioner sought damages on a variety of claims including

breach of contract for the additional cost of completing the project.

Respondent Val-U Construction on May 3, 1991, answered, denied that its work was deficient, and counterclaimed seeking arbitration or damages for breach of contract.

On May 6, 1991, an arbitration hearing was held in Rapid City, South Dakota. A local attorney served as arbitrator. Petitioner Tribe, relying upon its sovereign immunity, *U.S. ex rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244 (9th Cir. 1992), did not appear at the arbitration hearing and the arbitrator awarded respondents $793,943.58.

The trial on petitioner's claims against the parties responsible on the bonds was bifurcated from the breach of contract claims between petitioner and respondents. A trial was held on July 27, 1993. The District Court found that Harre, who is not a party to these proceedings, did not sign the bonds that had been submitted by Val-U Construction and that he was not liable as a surety. The District Court also found that Anthony, who also is not a party to these proceedings, also did not sign the bonds submitted by Val-U Construction but that he was equitably estopped from denying liability on the bonds.

Petitioner Rosebud Sioux Tribe determined that any judgment that it secured against respondents or any of the parties liable on the bonding would be uncollectible. Thus, petitioner Tribe requested the District Court to voluntarily dismiss its action, which it did with prejudice on March 29, 1994. At the same time, the District Court also dismissed all of the counterclaims made by respondents as being barred by the petitioner Tribe's sovereign immunity. Respondents appealed the dismissal of their counterclaims to the Eighth Circuit Court of Appeals which resulted in the opinion of March 16, 1995.

Respondents' position in the Eighth Circuit was that petitioner Tribe had waived its sovereign immunity by the language referring to arbitration or by the "sue and be sued" clause of its corporate charter. The Eighth Circuit ruled that the language of the arbitration clause, while spare, waived petitioner's sovereign immunity as to any claims under the contract. The Eighth Circuit held that petitioner had entered into the contract with respondents as a governmental entity so that the "sue and be sued" provision of its corporate charter did not operate as a waiver of the petitioner's sovereign immunity. The Eighth Circuit remanded the case to the District Court to hear respondents' counterclaims and to determine the validity and effect of the arbitration award.

REASONS FOR GRANTING THE WRIT

The decision of the Eighth Circuit Court of Appeals conflicts with the rulings of this Court on the sovereign immunity of Indian tribes and the decision of the Ninth Circuit Court of Appeals in *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (1989). The conflict will have serious consequences for Indian tribes and parties entering into agreements with them and involves an important issue of federal law that should be settled.

I. THE EIGHTH CIRCUIT DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT.

This Court has previously held that Indian tribes enjoy sovereign immunity from suit the same as that of the United States. *E.g., Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *United States Fidelity & Guar. Co. v. United States*, 309 U.S. 506 (1940).

A tribe may waive its sovereign immunity, but such a waiver cannot be implied, it must be unequivocally ex-

pressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Testan v. United States*, 424 U.S. 392 (1976); *Turner v. United States*, 248 U.S. 354 (1919). Waivers of sovereign immunity must be strictly construed. *United States v. Sherwood*, 312 U.S. 590 (1940).

When a tribe commences a lawsuit, it does not waive sovereign immunity from even compulsory counterclaims. *Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

The decision of the Eighth Circuit is in conflict with the principles set out in the above cases. An arbitration provision is nothing more than a choice of forum and a form of trial to be utilized in lieu of a trial at law. See *Wilko v. Swan*, 346 U.S. 427, 433 (1953). Such a provision does not necessarily implicate nor does it directly relate to a waiver of sovereign immunity. While a sovereign may agree to an arbitration forum, that forum, like any court, can only act and have its award confirmed if the sovereign has determined that it will waive its sovereign immunity. The consent to an arbitration forum is less indicative of a waiver of sovereign immunity than is the act of filing a lawsuit, which has been held not to constitute a waiver of sovereign immunity as to counterclaims. The Eighth Circuit in its decision realized that the arbitration language at issue was spare and that no decision of this Court has ever held that the presence of an arbitration provision constituted a waiver of sovereign immunity.

The Eighth Circuit decision in this case runs directly contrary to the prohibition against implied waivers of sovereign immunity. While the Eighth Circuit in its opinion holds that an arbitration provision is a clear expression of waiver, it could only reach this conclusion if it implied an intent on the part of the petitioner. "Consent by implication, whatever its justification, still offends the clear mandate of *Santa Clara Pueblo*." *Pan American Co.*

v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989).

II. THE EIGHTH CIRCUIT DECISION IS IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS.

In *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989), a written contract between the tribe and the company to manage its bingo enterprise provided that any dispute between the tribe and the company would be resolved by arbitration. The arbitration provision in that case was much broader and more specific than the one interpreted by the Eighth Circuit in Val-U Construction.

> In the event a dispute arises between its parties . . . either party may seek arbitration of said dispute and both parties do hereby subject themselves to the jurisdiction of the American Arbitration Association and do hereby agree to be bound by and comply with its rules and regulations as promulgated from time to time.

884 F.2d 419.

The company, Pan American, filed a demand for arbitration and later sued the tribe in California federal district court to enforce the contract. The case was dismissed on the ground that tribal sovereign immunity had not been waived and the Ninth Circuit Court of Appeals upheld the dismissal and reaffirmed the principle that waiver of tribal sovereign immunity must be "unequivocally expressed." 884 F.2d 420. In response to Pan American's argument that the above language in the arbitration clause was an express waiver of sovereign immunity the court stated:

> Pan American reads this clause as an explicit waiver of the Band's sovereign immunity since "a submission to arbitration is a submission to judicial jurisdiction . . . as a matter of definition." Such a reading of the

> arbitration clause runs counter to not only the strong presumption against tribal waivers of immunity, but also generally accepted principles governing the interpretation of contractual arbitration provisions.
>
> The Bingo Agreement's arbitration clause simply does not contain that unequivocal expression of tribal consent to suit necessary to effect a waiver of the Band's sovereign immunity.

884 F.2d 419.

III. THE CONFLICT HAS SERIOUS CONSEQUENCES TO INDIAN TRIBES AND PERSONS DOING BUSINESS WITH THEM AND INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED.

Indian tribes across the country, encouraged by federal legislation, e.g., Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, Indian Self-Determination Education and Education Assistance Act, 25 U.S.C. 450 *et seq.*, and Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, have undertaken many different economic development and business projects designed to improve tribal self-sufficiency. These business projects and undertakings have required Indian tribes and persons doing business with them to enter into business agreements dealing with resolution of disputes. E.g., 25 U.S.C. 1710(d)(3)(C) & 2711(b)(6). Because of the complicated nature of tribal jurisdiction, agreements often include provisions dealing with arbitration. The effect of such arbitration provisions is in a state of considerable confusion under the current state of the law; whether such provisions waive sovereign immunity depends on in which federal circuit or state the particular contract is being construed. Commerce is being impeded. This important issue of federal law has not been but should be settled by a definitive ruling from this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2083

ROSEBUD SIOUX TRIBE, THE UNITED STATES FOR THE USE AND BENEFIT OF THE ROSEBUD SIOUX TRIBE;
Plaintiff-Appellee;

v.

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, INC.; FREDERICK L. VALANDRA;
Defendants-Appellants;

GARY L. HARRE; EAGLE SURETY, INC.; LOU BAKER; WOODLANDS TRUST COMPANY; TAMMY BAKER; BRADLEY E. BAGGE;
Defendants;

RONALD MCDONALD;
Defendant-Appellant;

YANCEY LAMAR ANTHONY;
Defendant.

Appeal from the United States District Court
for the District of South Dakota

Submitted: December 16, 1994

Filed: March 16, 1995

Before RICHARD S. ARNOLD, Chief Judge; HEANEY, Senior Circuit Judge; and BARNES,* District Judge.

HEANEY, Senior Circuit Judge.

Val-U Construction Company ("Val-U") appeals the dismissal of its counterclaims against the Rosebud Sioux Tribe ("the Tribe") arising out of a contract to build housing on the Rosebud Sioux Indian Reservation. We affirm the dismissal of Val-U's counterclaims sounding in tort, because we agree with the district court that the Tribe did not waive its sovereign immunity with respect to those causes of action. We reverse the dismissal of Val-U's breach of contract counterclaims because we find that the contract's arbitration clause operated as a waiver of the Tribe's immunity.

BACKGROUND

In July 1989 Val-U Construction entered into a $3.6 million contract with the Tribe to build seventy-six housing units to serve a medical facility on the Rosebud Sioux Indian Reservation. Problems arose during the performance of the contract, and the Tribe terminated the contract in September 1990. The contract included an arbitration clause.

In October 1990 Val-U demanded arbitration of the contract termination. The Tribe refused to participate in the arbitration, citing sovereign immunity, and instead sued Val-U in April 1991 for breach of contract, presenting false payment vouchers, RICO violations, and fraud and misrepresentation. Val-U pleaded as an affirmative defense the contract's arbitration clause and, later, collateral estoppel based on the subsequent arbitration award

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* The Honorable Harry F. Barnes, District Judge for the Western District of Arkansas, sitting by designation.

in its favor. Val-U also counterclaims for breach of contract, loss of the ability to compete, and loss of reputation. The district court neither compelled arbitration of the Tribe's claims nor stayed the arbitration of Val-U's claims against the Tribe.

The arbitration proceeded without the Tribe's participation. In June 1991 the arbitrator awarded Val-U $793,943.58 plus interest, fees, and costs after finding the Tribe had breached the contract.

In September the district court heard the Tribe's motion to dismiss, which it granted regarding Val-U's tort counterclaims but denied with respect to the contract counterclaims. In a September 15, 1991, decision the court reiterated that Val-U's counterclaims were not barred by sovereign immunity to the extent of recoupment, but it deferred ruling on sovereign immunity as it pertained to any recovery beyond recoupment. The court reasoned that, because the case had not yet been tried, it was impossible to tell whether any recovery by Val-U would exceed that of the Tribe and therefore go beyond the recoupment principle.

In the meantime, litigation continued by the Tribe to enforce performance and payment bonds backed by individual sureties. In July 1993 the district court found one of the sureties liable on the bonds in the amount of $3,633,165.

Thereafter the district court granted Val-U's motion to dismiss the Tribe's claims for RICO violations and for fraud and misrepresentation regarding the performance and payment bonds, but denied Val-U's motion to dismiss all the Tribe's claims as barred by collateral estoppel and to enter judgment for Val-U based on the arbitration award. The court ruled that the contract's arbitration clause was not enforceable because it was not an explicit waiver of sovereign immunity. Motions Hrg. Tr. (Sept. 27, 1993), at 23.

In February 1994 the Tribe moved for voluntary dismissal under Fed. R. Civ. P. 41(a)(2). The court granted the motion to dismiss without prejudice and dismissed Val-U's counterclaims as limited to recoupment. It delayed entry of judgment, however, until the conclusion of litigation concerning claims brought by several subcontractors under the Miller Act, 40 U.S.C. § 270a-d.

Upon conclusion of the trial on the Miller Act claims, the court entered judgment in the principal litigation dismissing the Tribe's lawsuit with prejudice and holding that Val-U's counterclaim was barred by sovereign immunity to the extent it sought recovery beyond recoupment. Any claim for recoupment, in turn, became moot upon dismissal of the Tribe's complaint. *Rosebud Sioux Tribe v. Val-U Construction Co.*, Civ. 91-3019, slip op. at 1 (D.S.D. Mar. 30, 1994) (order of dismissal). Val-U appeals the dismissal of its counterclaims against the Tribe.

DISCUSSION

Val-U advances two arguments on appeal. First, Val-U contends that the Tribe waived its sovereign immunity via the contractual arbitration clause and by virtue of the "sue and be sued" clause in its corporate charter. Second, Val-U claims that, through the doctrine of collateral estoppel, it is entitled to summary judgment based on the arbitration award it obtained against the Tribe.

We first address the issue of whether the Tribe waived its sovereign immunity. The Tribe asserts that the arbitration clause is not a waiver of immunity and that the "sue and be sued" clause is irrelevant because the Tribe entered the contract with Val-U as a sovereign rather than a corporate entity. The district court concluded that the arbitration clause was not a clear waiver of immunity, but it did not address the "sue and be sued" clause in the Tribe's corporate charter. Motions Hrg. (Sept. 27, 1993), at 23. We review de novo the question of whether the

Tribe waived its sovereign immunity. *General Electric Capital Corp. v. Grossman,* 991 F.2d 1376, 1380 (8th Cir. 1993).

It is well established that Indian tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). A tribe may waive its immunity, but such waiver "cannot be implied but must be unequivocally expressed." *Id.* (internal quotation omitted). When a tribe brings a lawsuit, it does not waive immunity for counterclaims, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991), except for matters asserted in recoupment, *Rosebud Sioux Tribe v. A & P Steel, Inc.,* 874 F.2d 550, 552 (8th Cir. 1989). Recoupment is a defensive action that operates to diminish the plaintiff's recovery rather than to assert affirmative relief. *See Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1344 (10th Cir. 1982).

The first asserted waiver of immunity in this case is an arbitration clause which reads, "All questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." We conclude that this cause is a clear expression that the Tribe has waived its immunity with respect to claims under the contract.

The language of this clause is spare but explicit that disputes under the contract "shall be decided by arbitration." The clause further specifies that the arbitration shall proceed in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. Rule 47(c) of those rules states, "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." By designating arbitration in accordance with specified arbitration rules

as the forum for dispute resolution, the parties clearly intended a waiver of sovereign immunity with respect to resolving disputes under the contract. By definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense. *See Native Village of Eyak v. GC Contractors,* 658 P.2d 756, 760 (Alaska 1983).

We do not believe that the simplicity of the clause undermines its clarity or explicitness. In finding a waiver of immunity, we are mindful of the strong policy in support of tribal sovereignty and of the Supreme Court's prohibition of implied waivers of immunity. *See Santa Clara Pueblo,* 436 U.S. at 58-59. We note, however, that while the Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of "magic words" stating that the tribe hereby waives its sovereign immunity.

This court recently found a waiver of a tribe's sovereign immunity in the language of a complaint the tribe had brought in federal court. In *Rupp v. Omaha Indian Tribe,* Nos. 93-3103, 93-3106, 1995 WL 27483, at *3 (8th Cir. Jan. 26, 1995), the court found a waiver because the tribe "did not merely file a quiet title action" but "affirmatively requested the district court to order the defendants to assert any claims in the disputed lands." The court concluded that the tribe's explicit request that the defendants assert their claims was an unequivocal consent to such counterclaims. *Id.*

The *Rupp* opinion distinguished this court's holding in *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1376 (8th Cir. 1985), in which the court found no waiver from language in a promissory note that provided various remedies in the event of default "in addition to such other and further rights and remedies provided by law," allowed for attor-

ney's fees incurred in collection efforts, and stated that the law of the District of Columbia applied. The court stated that the tribe "did not explicitly consent to submit any dispute over repayment on the note to a particular forum, or to be bound by its judgment. To derive an express waiver of sovereign immunity from a promissory note that merely alludes to 'rights and remedies provided by law,' that provides for attorney fees in the event of a collection action, and that contains a choice of law provision, simply asks too much." *Id.* at 1380-81.

We too distinguish *Standing Rock*. Unlike that case, the parties here specifically designated an arbitral forum to settle disputes under the contract, as well as arbitration rules that explicitly provide for judicial enforcement of any arbitration award. The parties clearly manifested their intent to resolve disputes by arbitration, and the Tribe waived its immunity with respect to any disputes under the contract.

The waiver of immunity does not extend, however, to any tort claims by Val-U. The arbitration clause waives sovereign immunity only as to claims under the contract. Furthermore, we find that the "sue and be sued clause" in the Tribe's corporate charter does not operate as a general waiver of the Tribe's immunity from suit. *See, e.g., United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1174 (10th Cir. 1991) (formation of corporation does not affect tribe's power to act in governmental capacity). The record shows that the Tribe entered into the contract as a sovereign governmental entity. The construction contract was signed by the tribal chairman, and the Tribe oversaw the contract through the Tribal Council and the Medical Center Management Committee. There is no evidence that Val-U was dealing with a tribal corporate entity.

Having concluded that Val-U's breach of contract claims against the Tribe are not barred by sovereign immunity, we remand the case to the district court to hear

Val-U's counterclaims and, in so doing, to determine the validity and effect of the arbitration award Val-U obtained against the Tribe in the amount of $793,943.58, plus interest, fees, and costs. Val-U urges us to enforce the award by ordering that judgment be entered in its favor in that amount. We conclude, however, that the proper course is for the district court to examine the arbitration proceeding to decide its effect. *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 223 (1985).

Due to the diverse claims and parties involved in this case, Val-U's counterclaims against the Tribe have never been addressed by the district court despite the prolonged period of litigation. The court deferred any decision on the Tribe's sovereign immunity defense to the counterclaims until the litigation on the bonding and Miller Act issues was completed. The Tribe recovered on the bond from one of the sureties, and subcontractors recovered judgments from the surety and from Val-U on the Miller Act claims. Having made itself whole, the Tribe requested voluntary dismissal of its claims against Val-U pursuant to Fed. R. Civ. P. 41(a)(2). The district court granted the request and, in turn, concluded that any recovery by Val-U on a recoupment theory disappeared upon dismissal of the Tribe's claims, and that sovereign immunity barred any recovery outside of recoupment. As we have removed the Tribe's immunity defense by finding a waiver, the district court now has jurisdiction over Val-U's counterclaims and must determine the validity and effect of the arbitration award on those counterclaims against the Tribe.

Accordingly, we affirm the dismissal of Val-U's tort counterclaims but reverse the dismissal of its breach of contract counterclaims against the Tribe. We remand this case to the district court to hear those counterclaims.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2083SDP

ROSEBUD SIOUX TRIBE,
Appellee,

vs.

VAL-U CONSTRUCTION COMPANY OF
SOUTH DAKOTA, INC., *et al.*,
Appellants.

Appeal from the United States District Court
for the District of South Dakota

The petition for rehearing filed by the appellee has been considered by the court and is denied.

April 21, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX C

[Filed Mar. 30, 1994]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CIV. 91-3019

ROSEBUD SIOUX TRIBE and THE UNITED STATES for the use and benefit of the ROSEBUD SIOUX TRIBE,
Plaintiff

-vs-

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, FREDERICK L. VALANDRA, DR. YANCEY L. ANTHONY, GARY L. HARRE, EAGLE SURETY, INC., LOU BAKER, WOODLANDS TRUST COMPANY, TAMMY BAKER, BRADLEY E. BAGGE, and RONALD MCDONALD, Jointly and Severally,
Defendants.

ORDER OF DISMISSAL

All pending motions came on for hearing on February 25, 1994 by conference telephone with the plaintiff appearing by Mason D. Morisset by telephone, and with defendant Val-U Construction Company appearing by William G. Taylor, and with defendant Yancey Lamar Anthony appearing by Christopher G. McCary by telephone, and

The Court finds that the plaintiff's motion should be granted and the plaintiff's complaint should be dismissed with prejudice, and the Court further finds that all of the claims of defendant Val-U Construction Company are

barred by plaintiff's sovereign immunity except the claim for recoupment which becomes moot with dismissal of plaintiff's complaint. The application of Val-U Construction for monetary sanctions against plaintiff as a condition of dismissal is denied.

The Court further finds that all of the other claims by other parties in this action become moot with dismissal of the claims of plaintiff and defendant Val-U Construction Company, and that the entire action must be dismissed with prejudice.

The Court further finds that the application of Mason D. Morisset and K. Allison McGaw to withdraw as counsel for the plaintiff should be granted.

Upon the record herein,

IT IS ORDERED:

(1) That the Motion of Rosebud Sioux Tribe for Dismissal, Doc. 309, is granted.

(2) That all claims of all other parties are dismissed as moot; and defendant Val-U Construction Company's application for sanctions against the plaintiff is denied.

(3) That this action and all claims made herein are dismissed with prejudice.

(4) That the application of Mason D. Morisset and K. Allison McGaw for withdrawal as counsel for the plaintiff, Doc. 314, is granted, and they are relieved of any further obligations herein.

Dated this 29th day of March, 1994 at Pierre, South Dakota.

BY THE COURT:

/s/ John B. Jones
Chief Judge

APPENDIX D

CONTRACT BETWEEN CONTRACTOR AND ROSEBUD SIOUX TRIBE

This AGREEMENT, made the 18th day of July, 1989, by and between *Val-U Construction Co. of South Dakota, Inc.* hereinafter called the party of the second part (CONTRACTOR) and the Medical Center Management Committee Rosebud Sioux Tribe (MCMC) hereinafter called the party of the first part. The party of the second part (CONTRACTOR) and the party of the first part (MCMC) for the consideration hereinafter name agree as follows:

ARTICLE 1 SCOPE OF WORK:

The completion of Bid Schedule No. 4—Housing—Total Base bid and option Items 8, 9, 10, 11 and 12 as submitted, option items 6 and 7 may be added at a later date as provided in the specifications.

The party of the second part (CONTRACTOR) shall furnish all of the materials, labor and perform all of the work as described in the plans, specifications, and contract documents, prepared by Louis L. Weller Architects, P.C., 401-d Alvarado Dr. SE, Albuquerque, New Mexico 87108 hereinafter called the ARCHITECT.

ARTICLE 2 TIME OF COMPLETION:

The work to be performed under this Contract shall be commenced within ten (10) calendar days after the NOTICE TO PROCEED is issued to the CONTRACTOR and shall be completed within the time set forth herein:

First twenty units—120 Calendar Days from the date the Notice to Proceed is issued. Second forty units—320 Calendar Days from the date the Notice to Proceed is issued.

Liquidated damages will be charged for failure to complete the project on or before the completion date is in the amount of:

The amount from Special Conditions—32, Based on work not accepted.

Request for time extensions shall be made in writing to the [MCMC] on the CHANGE ORDER form. All time extensions will be issued by the [MCMC] and will be granted only for good cause beyond the control and without the fault and negligence of the Contractor.

ARTICLE 3 THE CONTRACT SUM:

The party of the first part [MCMC] shall pay the party of the second part [CONTRACTOR] for the performance of the Contract, subject to additions and deductions provided therein by CHANGE ORDERS in current funds as work progresses and requested on PAYMENT REQUEST forms:

In accordance with Bid Schedule No. 4 as submitted in the BID for the amount of $3,633,165.00

ARTICLE 4 CONTRACTING DOCUMENT:

The CONTRACT DOCUMENTS include the items in the Project Manual: Bid Requirements, Bid Documents, Contract Documents and any ADDENDUM thereto, Technical provisions and any Change Orders thereto. The Project Manual is referred to as the Specifications.

The party of the second part (CONTRACTOR) further agrees and states that he has read the Specifications and Plans and has visited the site and is familiar with the terms and conditions stipulated therein and that this Contract is for all materials and labor furnished and installed and in proper operation.

IN WITNESS WHERE OF:

The Rosebud Sioux Tribe, party of the first part, MCMC, having duly approved this Contract, has caused this Contract to be executed in its behalf by its Tribal Chairperson, thereunto duly authorized, and has hereto attached its seal this 31 day of July 1989.

PARTY OF THE FIRST PART Rosebud-Sioux Tribe	PARTY OF THE SECOND PART
By: /s/ Alex J. Lunderman Tribal Chairman	Val-U Construction Co. of S.D. Inc. Name of the company
	Date: July 31, 1989
ATTEST	By: /s/ Liedevich L. Valender
By: /s/ Sharon L. Burnette	Title: President
TITLE: Tribal Secretary	Address: 301 E. Malley Dr. #83 Northglenn, CO 80233 (303) 252-7329
SEAL	CORPORATE SEAL

APPENDIX E

CONTRACT NUMBER
102-88-0014

PROJECT NAMES & LOCATION

STAFF QUARTERS

ROSEBUD, SOUTH DAKOTA

PROJECT NUMBER
D10-425

Department of Health and Human Services
Office of Engineering Services
Seattle, Washington

ATTACHMENT H

SPECIAL CONDITIONS FOR CONSTRUCTION BID PACKAGES/SUBCONTRACTS

The contractor shall include Special Conditions similar to the following clauses in construction bid packages prepared and subcontracts awarded under this contract. The clauses shall be selected, edited, and used as necessary to properly identify the contracting parties (Government, Contractor, Subcontractor) and their contractual relationship and obligations.

SPECIAL CONDITIONS

INDEX

Paragraph		Title
—01		Architect
—02		Construction Sign
—03		Safety Barricades
—04		Materials On Site
—05		Salvage
—06		Items Furnished By Government And Installed By The Contractor
—07		Progress And Final Photographs
—08	N/A	Photograph On Samples Wall Panel
—09		Ceremonies
—10	N/A	Use Of Power Equipment By Contractor
—11		Use Of Equipment By The Government
—12		Vacating Of Premises
—13	N/A	Occupancy Of Premises
—14		Protection
—15		Equipment On The Site
—16		New Work
—17		Existing Work
—18		Sanitary Conveniences
—19		Temporary Water
—20		Temporary Light And Power
—21		Temporary Heat

INDEX—Continued

Paragraph		Title
—22		Heating
—23		Monuments And Bench Marks
—24		Measurements
—25		Maintenance Of Traffic
—26		Trucking
—27		Manuals
—28		Instruction Of Government Employees
—29		Project Drawings
—30		Hours Of Work
—31	N/A	Competency Of Contractors In Asbestos Removal
—32		Competency Of Contractors

-01 *ARCHITECT*

"Architect" refers to the professional services contractor,

_____

Name Address

_____

City State Zip

The Architect's status relative to this construction will be fully delineated, in writing by the Contracting Officer, at the pre-construction conference. The Architect may furnish personnel for site supervision, if required by his contract.

-02 *CONSTRUCTION SIGN*

Contractor shall furnish and erect signs on the site of the project as soon as practicable after commencement of work, located where directed by the Contracting Officer.

-03 *SAFETY BARRICADES*

a. Provide safety barricades in accordance with requirements of the Uniform Building Code for the State of ————, all local, and federal ordinances and codes, and in compliance with OSHA regulations.

b. Barricades shall be removed upon completion of the project, to the satisfaction of the Contracting Officer.

-04 *MATERIALS ON SITE*

Unless otherwise provided in the specifications or drawings, materials removed and not reused under the contract shall become the property of the contractor. The salvage value of such materials shall be taken into consideration in the preparation of the bids, but no separate credit therefore shall be stated. The materials shall be removed from the site by the contractor; and storage or sale of the materials on the site will not be permitted.

-05 *SALVAGE*

The Government does not assume responsibility for any loss or damage to materials removed and not reused under the contract which become the property of the contractor.

-06 ITEMS FURNISHED BY THE GOVERNMENT AND INSTALLED BY THE CONTRACTOR

FAR 52.245-3, "Identification of Government Furnished Property", is supplemented as follows:

Within —— calendar days after the receipt of Notice to Proceed, the contractor shall submit to the Contracting Officer a schedule in quadruplicate giving desired dates for delivery of items furnished by the Government. Schedule shall be subject to written

approval of the Contracting Officer. Approved dates of delivery shall be confirmed, thirty (30) days prior to delivery, by the contractor.

-07 *PROGRESS AND FINAL PHOTOGRAPHS*

a. Progress photographs, black and white, in sharp focus taken by a professional photographer, marked with the name of project, contractor, and date taken, shall be furnished and delivered flat. Prints shall be 8″ x 10″ and shall be furnished in gloss. One print shall be mounted on muslin, allowing 1-1/2″ flap on the narrow end for binding.

b. Progress photographs shall be taken on the first working day of each month (whether or not any work has been done during the preceding month), until the project is completed. The photographs shall be taken from (*four/two*) points, selected by the Contracting Officer. One set shall be delivered to the Architect and two sets to the Contracting Officer.

c. Final photographs, reproduced in triplicate, shall be taken when the project is completed, and shall be furnished subject to approval, to the Contracting Officer. The photographs shall be taken when daylight is bright or sunny and produced with such professional skill to be suitable for exhibition and reproduction.

Exterior photographs shall be taken from two points of view, one showing the entire front elevation and one side, the other showing the entire rear elevation and remaining side. The front elevation shall be proportionally dimensioned to appear longer than the side. Exterior photographs shall also be taken of each interior courtyard from two points of view, each showing two sides.

Interior photographs shall be taken from two points of view, as selected by the Contracting Officer, in each of the following rooms or spaces: _____ and one point of view in each of the following rooms or spaces: General Office Space or typical office floor lobby (showing elevator), machine room, _____.

d. Requirements for photographs shall apply to each building or structure under the contract.

e. If progress photographs are not furnished within five (5) days of the date due, the Contracting Officer will arrange to have the photographs taken, and the cost will be charged to the contractor. Final photographs shall be furnished as soon as possible, under the specified light conditions.

f. All negatives of progress and final photographs shall become the property of the Government. Upon completion of the work, the contractor shall deliver the negatives to the Contracting Officer.

-08 *PHOTOGRAPHS ON SAMPLE WALL PANEL*

This section is not applicable to this solicitation.

-09 *CEREMONIES*

Subject to mutually satisfactory arrangements between the parties to the contract, the Government may enter the premises during the term of the contract to conduct ceremonies, such as laying the cornerstone or dedication ceremonies, and to occupy temporarily such portions of the premises for the event. The ceremony area shall be cleared and cleaned of all contract activities.

-10 *USE OF POWER EQUIPMENT BY CONTRACTOR*

This section is not applicable to this solicitation.

-11 *USE OF EQUIPMENT BY THE GOVERNMENT*

FAR 52.236-11, "Use and Possession Prior to Completion", is supplemented as follows.

a. The Government will take over and operate such equipment as is necessary, with Government employees, for heating or cooling such areas of the building as require the service, as soon as the installation is sufficiently complete.

b. The Contracting Officer will advise the contractor by letter, prior to the use of equipment, stating what items of equipment will be operated, and the date and time such operation will begin.

c. Government operation of equipment will not relieve the contractor of the specified one-year warranty on materials and workmanship provided for in this contract.

d. The warranty period, for each piece of equipment, shall begin at the time the Government takes it over for operation.

-12 *VACATING OF PREMISES*

The Government will vacate the (*building/premises*) during performance of the work under the contract.

-13 *OCCUPANCY OF PREMISES*

This section is not applicable to this solicitation.

-14 *PROTECTION*

a. The contractor shall provide protection for all parts of the building, its contents and occupants wherever work under this contract is performed.

Furniture, office fixtures, and carpets shall be moved for performance of the work, stored on the premises, protected, and replaced.

b. The contractor shall provide dustproof enclosures or partitions for protection, in locations approved by the Contracting Officer.

c. High noise level operations involving equipment such as jackhammers, air compressors, and power actuated tools shall be scheduled for weekends, from Friday afternoon at 4:30 p.m. to Monday morning at 7:30 a.m. or after the normal weekday working hours, as approved by the Contracting Officer.

d. Temporary weatherproof partitions with suitable (*doors/windows*) shall be provided before exterior walls are removed.

-15 *EQUIPMENT ON THE SITE*

Equipment to remain in place, within the area of contract operations, shall be covered and protected against damage or loss. Equipment removed in performance of work under the contract shall be stored on the premises where directed, or shall be reused in work as shown or specified. Equipment temporarily removed shall be protected, cleaned, and replaced equal to its condition prior to starting work under the contract. Security for equipment or material to be reused, removed for temporary storage, shall be the responsibility of the contractor.

-16 *NEW WORK*

Unless otherwise noted on drawings or specified, new work in extension of existing conditions shall correspond in all respects to similar existing conditions, in material, workmanship and finish.

-17 *EXISTING WORK*

a. Existing work shall be cut, drilled, altered, removed or temporarily removed and replaced for performance of work under the contract. Work replaced shall match similar existing work. Structural members shall not be cut or altered, except as shown, without authorization of the Contracting Officer. Work remaining in place damaged or defaced during this contract shall be restored to the condition at time of award of contract.

b. Discolored or unfinished surfaces exposed by removal of existing work and indicated to be the final exposed surfaces, shall be refinished or the material shall be replaced to be uniform and harmonious with contiguous work. Work out of alignment, where exposed by removal of existing work, shall be called to the Contracting Officer's attention. Corrective work, directed by the Contracting Officer will be subject to adjustment of the contract in accordance with FAR 52.236-2, "Differing Site Conditions".

-18 *SANITARY CONVENIENCES*

a. Contractor shall provide temporary sanitary conveniences, at approved location, for use by employees on the contract. The installation shall be water supplied, connected to a sewer, and shall be protected against freezing. The convenience premises shall receive daily attention and shall be maintained in a clean and sanitary condition.

a. Contractor shall provide a temporary chemical type sanitary convenience, at an approved location, for use by employees on the contract. The convenience premises shall receive daily attention and shall be maintained in a clean and sanitary condition.

a. Contractor's personnel will be permitted to use a toilet room on the premises subject to regulation and control of the Contracting Officer. The convenience premises shall receive daily attention and shall be maintained in a clean and sanitary condition.

-19 *TEMPORARY WATER*

a. Government-owned and operated water systems are adequate for the use of the contractor as well as the Government. Reasonably required amounts of water will be made available by the Government from existing water systems without cost to the contractor. Contractor shall install and maintain, at his own expense, supply connections and facilities in locations and in a manner approved by the Contracting Officer. All water shall be carefully conserved. Before final acceptance, temporary connections and piping, installed by the contractor, shall be removed to the satisfaction of the Contracting Officer. Fire hydrants shall not be used as a temporary source of water supply.

a. Water system is not available on the site for contract work. Contractor shall make his own arrangements for water.

-20 *TEMPORARY LIGHT AND POWER*

a. The contractor shall furnish and install temporary electrical facilities, including lamps, for construction and safety operations. All temporary facilities shall remain the property of the contractor, and be removed after permanent connections have been completed. When temporary facilities interfere with Government operations or construction activities, the contractor, upon notification by the Contracting Officer, shall relocate

the temporary facilities, at no cost to the Government. Electrical wiring, conduit or equipment which are part of permanent electrical systems, shall not be used for temporary electrical facilities, unless specifically approved by the Contracting Officer. The contractor shall be responsible for any damage or injury to equipment, materials, or personnel caused by temporary electrical installation. Costs for materials and installation of temporary electrical facilities shall be at the expense of the contractor.

b. Contractor shall arrange and pay for energy consumed in providing temporary electrical facilities. Contractor shall install and maintain, at his own expense, connections and facilities in locations and in a manner approved by the Contracting Officer.

b. Electricity will be made available to the contractor by the Government from Government-owned or operated electrical systems, without cost to the contractor. Contractor shall install and maintain, at his own expense, connections and facilities in locations and in a manner approved by the Contracting Officer.

c. The hours of operation, level of illumination and coverage for safety of personnel shall meet the minimum requirements of the Contracting Officer.

-21 *TEMPORARY HEATING*

Applicable when existing heat shall be off for more than twelve (12) hours:

a. The contractor, at his expense, for contract activities, shall furnish, install, and maintain such temporary radiation and coils, with related piping and valves, and shall furnish all labor to

operate the heating plant and the ventilating apparatus when available, for purposes of producing temporary heating as described, and in accordance with specification requirements.

b. Temporary heating shall maintain a uniform temperature of 55° to 60°F throughout the building during normal working hours, and at other times shall provide a temperature to prevent damage to the building and its equipment. The service shall be continued until the permanent installation is in operation, and the building has been accepted by the Government.

c. Should heat be deemed necessary before the temporary heating plant operation as specified herein becomes feasible, other means, as approved by the Contracting Officer, shall be furnished and maintained at the contractor's expense.

d. Salamanders or open type burners will not be permitted. All piping, radiators, supports, and electrical controls required for the temporary heat shall be removed upon completion of the work, and shall not be used in the permanent contract work.

e. The contractor may utilize the permanent heating system and related equipment to furnish the specified heating results prior to the time of completion of the building. However, the equipment shall be operated by qualified personnel and in accordance with manufacturer's instructions.

f. Contractor shall, prior to the time of final inspection, place the permanent heating system and related equipment in first class, equal to new, condition, satisfactory to the Contracting Officer. Boiler water treatment shall be provided if condensate is wasted or if its use is considered necessary by the Contracting Officer.

g. The contractor's operation of the equipment shall not change the date of the guarantee period.

-22 *HEATING*

a. Heat shall be provided as follows:

In the existing building and the extension, heat at all times to protect materials and work in place, installed under this contract or other concurrent contracts, against injury from dampness and cold.

In areas of existing building occupied by Government personnel during the term of the contract, to maintain a temperature between 70° and 75°F.

b. Contractor shall furnish and install all temporary facilities, such as partitions, enclosures, radiation, piping and boiler equipment, including if necessary, temporary alterations in existing heating equipment.

c. The Contracting Officer will determine sufficiency and time when heat is to be provided in occupied portions of the building.

d. Contractor may utilize the existing heating system and the new equipment. Fuel will be provided by the Government. However, prior to final inspection, the entire system shall be placed in condition satisfactory to the Contracting Officer.

-23 *MONUMENTS AND BENCH MARKS*

a. The Government has established, or will establish, such general reference points as will enable the contractor to proceed with the work. The contractor will provide new monuments where shown or specified. If the contractor finds that

any previously established reference points have been destroyed or displaced, or that none have been established, the Contracting Officer shall be promptly notified.

b. The contractor shall protect and preserve the established bench marks and monuments, and shall make no changes in locations without the written approval of the Contracting Officer. Any monuments or bench marks lost, destroyed or disturbed because of changes in grades or locations shall, subject to prior approval by the Contracting Officer, be replaced and accurately located or relocated at the contractor's expense, by a licensed engineer or land surveyor.

c. New monuments shall be 6″ square by 3′ depth, concrete or stone, with ⅜″ diameter, 3″ length, copper or brass pin in the center, set flush with ground or pavement in locations indicated on approach plan.

d. Monuments will not be required where lines of building(s) are coincident with property lines.

e. After completion of construction and prior to final payment, the contractor shall furnish the Government blueprints (in triplicate) of plats showing the exact location of construction survey monuments with reference to true property lines.

-24 *MEASUREMENTS*

All dimensions shown of existing work and for connections with work now in place, shall be verified by the contractor by actual measurements of the existing conditions. Any discrepancies between the drawings and specifications and the existing conditions shall be referred to the Contracting Officer for adjustment before any work affected thereby has been performed.

-25 *MAINTENANCE OF TRAFFIC*

The contractor shall maintain vehicular traffic where existing roads are crossed, at all times, for installation of underground work as follows:

a. Excavate one-half of the roadway and provide a bridge over the open trench. After the bridge is in place, excavate the remaining half of the roadway and install a bridge over this portion.

b. Upon completion of installation of utilities, backfill one-half of the trench, and upon completion, backfill the second half of the roadway.

c. Backfill shall be as specified in applicable specifications section.

d. The bridge across the open trench shall be of steel plate and rigid deck framing, as approved by the Contracting Officer.

e. After completion of backfilling and removal of steel plates, provide and maintain a temporary cold laid bituminous patch, of 2″ thickness, until completion of permanent pavement.

-26 *TRUCKING*

a. All trucks, bringing to or removing from the site, earth, loose materials, or debris shall be loaded in a manner to prevent dropping of materials on streets.

b. At all points, where trucks leave the project site and enter adjacent paved streets, the contractor shall maintain an installation and crew to prevent any mud from being carried onto such adjacent paved streets.

c. Earth, loose materials, or debris deposited on the streets due to contract trucking activities shall be removed daily.

-27 *MANUALS*

a. In addition to the shop drawings, coordinated drawings, schedules, and other descriptive literature submitted for approval, as specified, the contractor shall furnish to the Contracting Officer operating and maintenance manuals for each item of equipment and system in accordance with requirements of other sections.

b. The manuals shall include copies of all corrected and approved shop drawings, schedules, catalogue data, illustrations, performance curves and rating data, wiring and control diagrams, manufacturer's installation, operating and maintenance instructions, including safe operating procedures and requirements, spare parts lists and other pertinent information for the specified equipment and systems.

c. The manuals shall include the names, addresses and telephone numbers of each subcontractor installing the equipment and systems, and the local representatives for each item of equipment and each system.

d. The manuals shall be submitted in — copies and a minimum of — calendar days prior to commencement of any instruction period or if this is not specified, — days prior to final acceptance by the Government.

e. The manuals shall be in the form of (*bound/3-ring loose leaf*) volumes, with hard covers, tables of contents, and typed or printed information pages, and related illustrations, drawings, and diagrams compiled to fit neatly into the manual. Pages and other information shall not be larger than 8½″ x 11″, except sheets may be folded to that size and used as a pull-out.

f. Contractor is to furnish three (3) complete sets of the Operation and Maintenance Data to include the following:

(1) Manufacturers', and suppliers' names, addresses, and phone numbers.

(2) Schedule of routine maintenance for each component.

(3) Replacement part numbers.

(4) Written guarantees.

(5) Any applicable drawings.

-28 *INSTRUCTIONS OF GOVERNMENT EMPLOYEES*

a. The contractor shall furnish, without additional expense to the Government, the services of competent instructors, who will give full instruction in the adjustment, operation, and maintenance, including pertinent safety requirements of the equipment, as specified in other sections, to the designated Government employees.

b. Each instructor shall be thoroughly familiar with all parts of the installation on which he/she is to give instruction, and shall be trained in operating theory as well as in practical operation and maintenance work.

c. Instruction shall be given during the regular work week after the building has been accepted and turned over to the Government for regular operation. The number of man-days (eight-hour) of instructions furnished for each system shall be as specified in other sections. Where more than four (4) man-days of instruction are specified for a system approximately half of the time shall be used for classroom instructions. All other time shall be used for instruction at the

equipment. Where significant changes or modifications in equipment are made under the terms of the guarantee, additional instruction shall be provided to acquaint the operating personnel with the changes or modifications.

-29 *PROJECT DRAWINGS*

The contractor shall perform all work in accordance with the specifications and as shown on the accompanying drawings listed below.

TITLE *DRAWING NO.* *DATE*

-30 *HOURS OF WORK*

FAR 52.236-10 is supplemented as follows:

All work shall be performed between 7:00 a.m. and 5:00 p.m. local time, Monday through Friday. In the event that the contractor wishes to work on the day of a Government holiday, he shall notify the Contracting Officer seven (7) days in advance of the date he wishes to work. There shall be no work scheduled on weekends without special approval by the Contracting Officer prior to 4:00 p.m. Seattle time on the preceding Thursday.

-31 *COMPETENCY OF CONTRACTOR IN ASBESTOS REMOVAL.*

This section is not applicable to this solicitation.

-32 *COMPETENCY OF CONTRACTOR*

a. The contractor or the subcontractor whom the contractor will use for performance of the —— work, shall have had at least —( ) years successful experience in installing and servicing of ———— systems.

b. In addition, the contractor or the subcontractor shall have had at least —( ) prior projects,

— ( ) of which are comparable to the removal procedures required for this project and which have performed satisfactorily under conditions of normal use for a period of not less than — ( ) years.

c. A list of the prior comparable projects by the contractor or by the subcontractor, together with the names and addresses of the buildings, the names of the owners or managers thereof, and any other pertinent information required shall be submitted promptly upon request of the Government.

d. The names, addresses, experience, and a statement of the work to be performed by each subcontractor or second-tier subcontractor whom the contractor or the principal subcontractor, as the case may be, will use for performance of minor positions of the installation of ——— systems shall also be submitted promptly upon request by the Government.

e. Failure to meet the experience requirements of this clause may be cause to require the contractor to propose another subcontractor to perform the ——— portion of this contract.

APPENDIX F

ADDENDUM NUMBER THREE

ROSEBUD STAFF QUARTERS
MCMC
Medical Center Management Committee
Rosebud, South Dakota

Project No. D-10-425/IHS-981

VIA FAX

The following modification and additions shall be incorporated into the Contract Documents for the above mentioned project. Receipt of this addendum must be acknowledged on the Bid Proposal Form. Failure to do so may subject bidder to disqualification.

The addendum consists of one (1) page.

A. ITEM "B" CONTRACT DOCUMENTS" shall be deleted.

B. Special Conditions, Page SC-10, add the following:

33 *ARBITRATION*

All questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

END OF ADDENDUM NO. THREE

(2)

Supreme Court, U.S.
FILED
JUL 13 1995
CLERK

No. 94-2042

In The

Supreme Court of the United States

October Term, 1995

ROSEBUD SIOUX TRIBE, THE UNITED STATES FOR THE USE AND BENEFIT OF THE ROSEBUD SIOUX TRIBE,

Petitioner,

v.

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, INC., FREDERICK L. VALANDRA, and RONALD McDONALD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM TAYLOR
Counsel of Record
JAMES E. MOORE
WOODS, FULLER, SHULTZ & SMITH, P.C.
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Attorneys for Respondents

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OR CALL COLLECT (402) 342-2831

7pp

QUESTION PRESENTED

In 1989, the parties entered into a construction contract, which contained an arbitration clause. The contract provided

> "[a]ll questions of dispute under this agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."

Does the arbitration clause, by which the parties agreed to submit particular disputes to a particular forum in accordance with particular rules, waive the Tribe's sovereign immunity?

STATEMENT OF THE CASE

Certain portions of the Petitioner's Statement of the Case contain references to matters that are not part of the settled record. Enumerated below, Respondents request those matters not be considered by this Court in this proceeding.

Petitioner, in the fifth paragraph of its Statement of the Case, asserts that Respondents breached the subject construction contract, enumerating four reasons. The enumerated reasons are not part of the settled record, but rather, a summary of allegations from the Petitioner's pleadings, and should not be considered by this Court.

In the eleventh paragraph of its Statement of the Case, the Petitioner explains its reasons for dismissing its complaint against the Respondents. The enumerated reasons are not part of the settled record, but rather, an editorial statement by Petitioner, and should not be considered by this Court.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT FOLLOWED THIS COURT'S DECISIONS.

The Eighth Circuit Court of Appeals did not depart from this Court's rulings regarding sovereign immunity of Indian tribes. The Eighth Circuit, at page 562 of its opinion in the subject case, *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir.1995), recognized that

suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation, and that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " The Eighth Circuit relied on this Court's governing opinions. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969))). The Eighth Circuit did not establish new standards regarding waiver of sovereign immunity.

Petitioner contends the subject Eighth Circuit decision sanctions implied waivers of sovereign immunity. That is simply not the case. In its decision, the Eighth Circuit ruled that the subject arbitration provision was a clear and unequivocal waiver of sovereign immunity. The Eighth Circuit properly concluded that a written agreement to submit Tribal-contractor disputes to a particular forum for resolution according to particular rules was an express waiver of sovereign immunity, the only conclusion that gives any effect to the arbitration clause.

As the Supreme Court of Alaska recognized in holding that an almost identical arbitration clause waived tribal sovereign immunity, "any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity." *Native Village of Eyak v. G. C. Contractors*, 658 P.2d 756, 760 (Alaska 1983). In other words, the arbitration clause "would be meaningless if it did not constitute a waiver." *Id.*

Following the reasoning of the Alaska court, the Eighth Circuit observed that the subject arbitration clause was meaningless if it did not constitute a waiver, holding, at 50 F.3d at 562:

> "By definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense."

The Tribe does not contend that any other construction of the arbitration clause would make sense, but rather that the Eighth Circuit's construction of the clause – the only meaningful and logical construction – is a forbidden implied waiver.

The Eighth Circuit's decision is no different than its own widely followed decisions that a "sue and be sued" clause in a tribal charter expressly waives sovereign immunity. *See Rosebud Sioux Tribe v. A & P Steel,* 874 F.2d 550, 552 (8th Cir. 1989). Like the subject arbitration clause, "sue and be sued" clauses do not expressly say "the tribe hereby waives its sovereign immunity," but this Court has never required any such language. *See Rosebud Sioux Tribe,* 50 F.3d at 563 (noting that this Court "has never required the invocation of 'magic words' "). The Eighth Circuit's decision does not sanction, by general rule or particular application, implied waivers of sovereign immunity. Rather, it recognizes the arbitration clause for what it is – an express waiver of sovereign immunity.

II.

THE EIGHTH CIRCUIT DECISION IS CONSISTENT WITH OTHER STATE COURT DECISIONS.

Val-U Construction is aware of only three other cases expressly considering an arbitration clause a waiver of tribal immunity. In *Native Village of Eyak,* the Alaska Supreme Court held a construction contract clause requiring that disputes "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association" was an express waiver. 658 P.2d at 760-61. *Accord Hydaburg Co-op. Ass'n v. Hydaburg Fisheries,* 826 P.2d 751, 754-55 (Alaska 1992). In *Val/Del, Inc. v. Superior Court,* 703 P.2d 502, 508-09 (Ariz. Ct. App.), *cert. denied,* 474 U.S. 920 (1985), the Arizona Court of Appeals held a contract arbitration clause requiring disputes "be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association" was an express waiver. In *Pan American Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418-19 (9th Cir. 1989), as the Tribe argues, the Ninth Circuit Court of Appeals held otherwise.

Only one state court of last resort and two federal courts of appeal have addressed the question presented since this Court denied certiorari in *Val/Del,* ten years ago. The paucity of reported cases suggests that the Eighth Circuit decision does not present an important issue of federal law requiring this Court's attention, and that the law is hardly "in a state of considerable confusion." (Pet. Writ Cert. at 9.) No compelling reason exists why this Court should use this case to review a 1989 decision of the Ninth Circuit Court of Appeals.

CONCLUSION

The Petitioner has not asked this Court to review general principles of tribal sovereign immunity. No question that will be of particular consequence to Indian tribes other than the Rosebud Sioux Tribe is presented in this case. Val-U Construction respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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